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No. 82-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,
Petitioner,

v.

MELVIN PAXTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

ERWIN N. GRISWOLD
(Counsel of Record)

PAMELA S. EDDY
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Counsel for the Petitioner

Of Counsel
JAMES E. DARR, JR.
EICHENBAUM, SCOTT, MILLER,
CROCKETT, DARR & HAWK, P.A.
Suite 1400
Union National Bank Building
One Union National Plaza
Little Rock, Arkansas 72207
(501) 376-4531

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This Supplemental Brief is filed in view of this Court's recent decision in *United States Postal Service v. Aikens,* 51 U.S.L.W. 4354, decided April 4, 1983.

In the *Aikens* case, as in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court outlined the appropriate allocations of proof for Title VII cases. Under those decisions, the district court is the appropriate fact-finder. In such cases, the district court is to determine (1) whether the plaintiff has established a prima facie case, and (2) whether, in turn, the defendant has articulated a "legitimate, non-discriminatory" reason for his employment decision. After considering whether the proferred explanation is pretextual, the fact-finder must then (3) determine on all the evidence whether the employment decision was intentionally discriminatory. The burden of persuasion in the final determination is on the plaintiff. *Aikens,*

supra at 2-4. This Court further directed that if there is misapplication of this proof scheme, there should be a remand of the case to the district court, so that the fact-finder may reconsider the ultimate question of discrimination. See *Aikens, supra* at 4-5.

In the present case, the district court's opinion demonstrates its total adherence to the proof scheme approved by this Court for Title VII cases. The district court ruled that respondents had not established a prima facie case. However, the court nevertheless then assumed that the respondents *had* established a prima facie case. Pet. App. B at 97a. Based on that analysis, the district court then ruled that petitioner had *more than sustained* its burden of articulating a nondiscriminatory reason for its employment decisions. *Id.* Finally, and precisely as ordered by this Court in *Aikens,* the district court considered the respondents' ultimate burden of proof and ruled that the "plaintiffs and intervenors have failed to sustain this ultimate burden of proof or persuasion." *Id.*

Notwithstanding the district court's proper application of the proof scheme reaffirmed by this Court in *Aikens,* the appellate court below reversed those findings as being "clearly erroneous." Pet. App. A at 17a. It did so notwithstanding its specific recognition that the district court had adhered to such proof scheme, Pet. App. A at 18a, 22a, 25a, 27a, 28a, 32a, and 33a, a recognition which should have impelled it to the conclusion that it was necessarily engaging in a prohibited review of ultimate factual determinations. Notwithstanding and contrary to this Court's decision in *Aikens* that the district court is the appropriate fact-finder in discrimination cases, as in all civil litigation, the appellate court below did not remand to the district court. The appellate court instead engaged in an independent review of the facts found below.

This Court's decision in *Aikens* emphasizes the basic fact-finding responsibility of the district court. If the decision below remains unreviewed, it will impair the clarification made by the *Aikens* decision. A clear and unequivocal mandate based on the teachings of *Pullman-Standard v. Swint,* 102 S. Ct. 1781

(1982), and *Inwood Laboratories v. Ives Laboratories*, 102 S. Ct. 2182 (1982), as supplemented by *Aikens*, is needed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)

Pamela S. Eddy
Jones, Day, Reavis & Pogue
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Counsel for the Petitioner

Of Counsel

JAMES E. DARR, JR.
EICHENBAUM, SCOTT, MILLER,
CROCKETT, DARR & HAWK, P.A.
Suite 1400
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Little Rock, Arkansas 72207
(501) 376-4531

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